No. 89-1279

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

PACIFIC MUTUAL LIFE INSURANCE COMPANY,
Petitioner,

v.

CLEOPATRA HASLIP, CYNTHIA CRAIG,
ALMA M. CALHOUN, and EDDIE HARGROVE,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Alabama

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RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should review due process challenges to a state court punitive damages award in a case in which the factual record does not indicate what portion of that award, if any, constituted punitive damages.

2. Whether this Court should review a due process challenge to the "vicarious" imposition of punitive damages in a case in which the factual record demonstrates that petitioner had full knowledge of, and participated in, the fraud perpetrated by its agent.

3. Whether this Court should review a due process challenge to the imposition of punitive damages when the law pursuant to which damages were awarded has been supplanted by legislation and is unique among the States in any event.

4. Whether this Court should review a due process challenge to "unbridled jury discretion" to award punitive damages in a case in which the discretion of the jury awarding damages was guided and confined by substantive limitations and procedural safeguards against arbitrariness.

5. Whether fundamental principles of judicial restraint and federalism should lead this Court to decline to constitutionalize the law of punitive damages in light of the complexity of the issues involved and widespread legislative initiatives in this area.

6. Whether petitioner's remaining due process and equal protection challenges to the damages award in this case raise any unresolved federal question of substantial importance.

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STATEMENT OF THE CASE

Petitioner Pacific Mutual's highly selective statement of the case omits crucial facts. A fuller exposition of the factual record makes clear that this is not an appropriate case for deciding the extent to which the Due Process Clause of the Fourteenth Amendment limits state authority to award punitive damages—or any of the other questions presented in the petition.

A. The Fraud Perpetrated Against Respondents

Pacific Mutual seeks to portray the conduct that harmed respondents as a mere oversight not corrected in time.[1] In fact, this case involves a deliberate fraud perpetrated by Pacific Mutual's agents against respondents Cleopatra Haslip, Cynthia Craig, Alma M. Calhoun and

[1] *See* Petition for Certiorari ("Petition") at 6.

Eddie Hargrove—a fraud Pacific Mutual had reason to suspect but did nothing to prevent.

Respondents are black employees of the municipal government of Roosevelt City, Alabama, a small rural community. They purchased life and health insurance through group policies made available to city employees. In 1981, shortly after Blue Cross canceled the city's group policy, Mr. Lemmie Ruffin—one of the original defendants in this action—approached the City Clerk to offer replacement insurance. Ruffin was an employee of Pacific Mutual, and worked as an agent out of the company's regional office in Birmingham. After giving the City Clerk a business card indicating his affiliation with Pacific Mutual, Ruffin offered to secure group life and health insurance policies for city employees.[2]

Through Ruffin's efforts, Pacific Mutual made group life insurance available to Roosevelt City employees. Pacific Mutual does not, however, issue group health policies for municipalities—a fact Ruffin concealed from the City Clerk. Instead, as a matter of policy, Pacific Mutual encourages its agents and employees to broker group health insurance from other insurers. At trial, a Pacific Mutual official explained that the company pursued this policy because it increased overall sales of Pacific Mutual insurance; if agents were not able to package Pacific Mutual's group life insurance with another company's group health coverage, Pacific Mutual would risk losing the business of customers—like Roosevelt City—that required both types of coverage.[3]

Ruffin submitted a proposal to Roosevelt City on stationery bearing Pacific Mutual's letterhead.[4] This proposal provided Roosevelt City's municipal employees with group life insurance through Pacific Mutual, and group health insurance through Union Fidelity.[5] During negotiations with the City Clerk, Ruffin falsely represented that Union Fidelity was a Pacific Mutual subsidiary providing hospitalization coverage.[6] Roosevelt City accepted this offer, and the City Clerk began deducting premiums from the pay of employees who chose to purchase the insurance. Approximately $53 was deducted from Ms. Haslip's semi-monthly paycheck of $280, and similar amounts were deducted from the other respondents' paychecks. The City collected these premiums monthly and sent them to Ruffin.

Instead of forwarding these collected premiums to the insurers, Ruffin pocketed the money. As result, policies covering Roosevelt City's employees lapsed. Respondents never received late premium or cancellation notices because Ruffin and Pacific Mutual's agency manager for Birmingham—Mr. Patrick Lupia—together connived to change the billing address for the group health policy from the City Clerk's office to Pacific Mutual's Birmingham office. All late payment and cancellation notices from Union Fidelity thus went to Ruffin and his superior at Pacific Mutual.[7] Unaware that their coverage was in jeopardy and eventually terminated, respondents continued to pay premiums to Ruffin, who continued to misappropriate them.[8]

The fraudulent scheme unravelled when Mrs. Haslip was hospitalized in January 1982 for kidney treatment. After incurring several thousand dollars in medical ex-

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[2] *See* Trial Transcript ("Tr.") 92-93, 433, 743.

[3] Tr. 429 (Pacific Mutual allowed brokering of other company's group health insurance "for the sake of not losing the business"); *id.* at 431.

[4] *See* Tr. 305 & Plaintiffs' Exhibits 2, 12.

[5] With the full knowledge and approval of Pacific Mutual, Ruffin was licensed to broker group health insurance from the Union Fidelity Life Insurance Company.

[6] Tr. 100, 132, 228, 304, 317, 330.

[7] Tr. 251-271, 393-394.

[8] *See* Tr. 104-105, 161, 251-271.

penses, she discovered she had no health insurance. As a result, she could not afford any portion of her $2,700 hospital bill. The hospital refused to release her until her daughter raised funds sufficient to pay $600 of the bill. Mrs. Haslip also owed substantial amounts to her physicians. Her expenses for treatment exceeded $3,800 —*more than half her annual take home pay.*[9] Unable to pay her debts, Mrs. Haslip was sued by the hospital and her urologist; became the target of a collection agency; suffered the ruin of her credit rating; and endured substantial mental anguish as a proximate result of the fraud. She still owes her creditors on these 1982 obligations. App. B3.[10]

In short, as the trial court found when it rejected Pacific Mutual's motion for judgment notwithstanding the verdict, "[t]he conclusion is inescapable that the fraud was intentional, gross, oppressive and malicious." App. A14.

B. Pacific Mutual's Role in the Fraud

To fortify its Due Process challenge to the "vicarious" imposition of punitive liability, Pacific Mutual seeks to put substantial distance between itself and this fraudulent scheme.[11] The Alabama Supreme Court, however, concluded otherwise. Based on facts petitioner omitted from its statement of the case, the Alabama Supreme Court found that

> "there is no question that sufficient evidence existed to support the jury's determination that Lemmie Ruffiin and his agency manager, Patrick Lupia, were acting within the line and scope of their employment *with Pacific Mutual* when Ruffin made the

[9] Her yearly take-home pay was approximately $6,720.

[10] *See also* Tr. 190-200.

[11] *See* Petition at 17 ("Pacific Mutual was unaware of Mr. Ruffin's conduct and was given no opportunity to address the situation prior to the lawsuit").

> representations to the plaintiffs that became the subject of this lawsuit."

App. B9 (emphasis added).

Indeed, Pacific Mutual's involvement was pervasive:

— Ruffin was a Pacific Mutual employee and agent;

— he worked out of an office staffed and paid for by Pacific Mutual;[12]

— he purported to be selling Pacific Mutual health insurance to Roosevelt City;[13]

— he used a Pacific Mutual business card and corresponded with the City Clerk on Pacific Mutual letterhead;[14]

— he prepared each month's bill on Pacific Mutual stationery;[15]

— his offer of a "package" of Pacific Mutual life insurance and Union Fidelity health insurance was made pursuant to an explicit Pacific Mutual strategy designed to increase Pacific Mutual's life insurance sales.[16]

Moreover, *Pacific Mutual's agency manager for the Birmingham office—Patrick Lupia—knowingly assisted the fraudulent scheme.* Lupia personally intervened with Union Fidelity to ensure that billing notices for the group health policy were diverted to him and Ruffin at Pacific Mutual's office in Birmingham rather than being sent directly to the insureds. The late premium and cancellation notices also went directly to Pacific Mutual's office. Indeed, at least one cancellation notice was addressed to Lupia himself. This diversion kept respond-

[12] Tr. 415.

[13] Ruffin described the Union Fidelity group health policy as "the hospital part of Pacific Mutual." Tr. 100.

[14] App. B2-B3; *see also* Plaintiffs' Exhibits 2, 7, 12.

[15] *See* App. B2-B4; *see also* Tr. 124, 141, 448 and Plaintiffs' Exhibit 7.

[16] *See* Tr. 429, 431.

ents ignorant of Ruffin's misappropriation of their premiums. *See* App. B3.[17]

Furthermore, the evidence showed that Pacific Mutual had long been aware of similar frauds perpetrated by Mr. Ruffin while acting as a Pacific Mutual agent, *and did nothing to prevent or remedy them.* One employee of Pacific Mutual's Birmingham office testified that she received and forwarded to Pacific Mutual officials frequent complaints about other frauds by Mr. Ruffin.[18] Ruffin's prior victims also testified that they had complained to Pacific Mutual's home office to no avail.[19] As the Alabama Supreme Court concluded, the evidence overwhelmingly demonstrated that:

> "Lupia had received complaints from policy-holders alleging that Ruffin was engaging in fraudulent activities but he had done nothing to prevent them. Pacific Mutual's home office had received complaints regarding Ruffin's fraudulent activities but had done nothing about them."

App. B9.

C. The Jury Verdict

The jury was charged that it could award compensatory damages for both out-of-pocket loss and mental anguish caused by fraud, and counsel for respondents stressed these compensatory damages in evidentiary submissions and closing argument. The jury was also instructed that it could award punitive damages. The jury returned verdicts for each respondent in the following amounts: Mrs. Haslip, $1,040,000; Mrs. Craig $12,400; Mrs. Calhoun $15,290; and Mr. Hargrove $10,288. App. B3. Be-

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[17] *See also* Tr. 256-258, 395 and Plaintiffs' Exhibits 35, 36.

[18] *See* Tr. 490-503.

[19] Tr. 366-386 (testimony of Williams); Tr. 545-553 (testimony of Spencer).

cause these were general verdicts,[20] the extent to which the awards represented compensation for mental anguish and the extent to which they represented punitive damages cannot be determined. Indeed, there is no assurance that *any* portion of the award was punitive. As the trial court observed, "[t]he jury seems to [have] fashioned their awards in proportion to the damage done each plaintiff; awarding the most damaged plaintiff, Cleopatra Haslip, the larger award and the least damaged plaintiff, Eddie Hargrove, the least award." App. A15.[21] Thus, Pacific Mutual's plaint that it "was fined over $1,000,000 for the acts of Mr. Ruffin" [22] is—at best—wholly insupportable speculation.

D. Review by the Alabama Courts

The trial court carefully reviewed the jury's damages awards. In particular, the court applied the standards and followed the procedures set forth by the Alabama Supreme Court in *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986), in determining whether the award was appropriate. In conformity with Alabama law, the court held a hearing, considered the relevant substantive criteria identified by the Alabama Supreme Court, and set forth in writing its reasons for upholding the award. The Alabama Supreme Court carefully reviewed the damages issues on appeal, and affirmed the trial court's judgment.

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[20] Pacific Mutual did not request special verdicts, to which they were entitled.

[21] The trial court specifically noted that Pacific Mutual had the full benefit of a fair-cross section of the community on its jury. *See* App. A15 ("The jury was composed of male and female, white and black, and in the opinion of the Court, acted conscientiously throughout"). *Cf. Batson v. Kentucky*, 476 U.S. 79 (1986); *Thomas Construction Co. v. Diversified Contractors, Inc.*, 551 So. 2d 343 (Ala. 1989).

[22] Petition at 9.

REASONS FOR DENYING THE WRIT

Although Pacific Mutual seeks review of a host of Fourteenth Amendment questions, the petition emphasizes two: (1) whether Due Process precludes an award of punitive damages by a jury exercising unconstrained, standardless discretion; and (2) whether Due Process precludes imposing "vicarious" liability on an innocent principal for the culpable conduct of an agent.

Plenary review is not warranted in this case for many reasons. The factual record does not present with sufficient clarity the issues Pacific Mutual raises. Point I. The Alabama law applied in this case is no longer in effect, and was unique to Alabama even when it was in effect. Point II. That law did not permit awards of punitive damages in the "unbridled discretion" of the jury, and therefore this case does not present the only issue about which the Court has indicated interest in this area. Point III. In any event, there is increasing reason for this Court to forebear from reaching the issue of purportedly standardless punitive damages awards. Point IV. And Pacific Mutual's remaining questions present no unsettled issues of any significance. Point V.

I. THE FACTS OF THIS CASE DO NOT PRESENT AN APPROPRIATE SETTING FOR REVIEWING THE CONSTITUTIONAL ISSUES RAISED IN THE PETITION.

Even if Pacific Mutual has identified due process issues that would merit review in an appropriate case, they should not be reviewed in this case because the record does not present them with sufficient clarity. *See Mishkin v. New York*, 383 U.S. 502, 512-513 (1966).

First, the record permits no firm conclusion as to whether punitive damages were awarded at all, or if so, in what amount. Because the jury rendered a general verdict in favor of each respondent, the awarded amounts in excess of out-of-pocket losses may well represent compensation for mental anguish. Mrs. Haslip, who received the largest award by far, suffered mental anguish, humiliation, and the loss of credit—which is particularly devastating to a person of her limited means—as a result of the fraud. Pacific Mutual thus has no sound basis for assuming that the *punitive* component of the jury award exceeded $1,000,000. Given that Pacific Mutual may not have suffered *any* punitive award in this case, its due process challenges are wholly hypothetical and abstract.[23]

Even if some part of the verdict is punitive, this Court cannot ascertain whether the punitive award was disproportionate to the compensatory award. It may be, for example, that most of the verdict in favor of Mrs. Haslip was compensatory.[24] Thus, even if Due Process required proportionality between the harm caused and the damages awarded—which it does not[25]—the case does not squarely present the question whether the verdict violated "Pacific Mutual's right to be free of grossly excessive, disproportionate damages awards." Petition at *i*.

This ambiguity also prevents meaningful review of the issue whether Due Process is implicated by punitive damages awarded "without any necessary relationship to the amount of actual harm caused." *Id.* Two members of the Court have indicated that constitutional scrutiny of common law punitive damages awards may be warranted because "[p]unitive damages are not measured against actual injury, so there is no objective standard that limits their amount." *Bankers Life and Casualty Co. v. Crenshaw*, 486 U.S. 71, 108 S. Ct. 1645, 1655 (1988) (O'Connor and Scalia, JJ. concurring). Here even the actual injury is uncertain, making this an inappro-

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[23] This Court does not "decide . . . abstract propositions." *Tyler v. Judges of the Court of Registration*, 179 U.S. 405, 409 (1900); *Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 73-74 (1955).

[24] At trial, Mrs. Haslip specifically requested several hundred thousand dollars in compensatory damages for mental anguish, Tr. 811-813, and the jury was free to award more.

[25] The wrongfulness of intentional or reckless conduct can be assessed by many measures other than the quantum of harm caused. Other relevant measures include the magnitude of the risk created or the gravity of the wrong.

priate case for reviewing alleged disparities between actual injury and the punitive award. At a minimum, this issue should be addressed in a case where the facts establish that punitive damages were imposed without reasonable relation to actual harm.[26] The facts here do not present such an opportunity.

Second, even if review were warranted on the question whether Due Process precludes imposing punitive damages upon an "innocent principal," Petition at 20,—and it is not [27]—the facts of this case do not raise the issue. Pacific Mutual's liability did not arise solely from the unauthorized conduct of a renegade agent. To the contrary, as the Alabama Supreme Court made clear, Pacific Mutual's corporate responsibility was premised on *corporate* malfeasance. Pacific Mutual's Birmingham manager played an indispensable role in the fraudulent scheme. *See* App. B9. And Pacific Mutual's home office ignored repeated complaints—made both to the home office and to the Birmingham office—about other frauds by Ruffin. *Id.* Pacific Mutual therefore had ample opportunity to prevent the frauds perpetrated in its name, but did nothing. These facts render Pacific Mutual's due process challenge to "vicarious" liability for punitive damages wholly hypothetical and abstract.

II. PLENARY REVIEW WILL NOT RESULT IN THE ESTABLISHMENT OF PRINCIPLES OF CONSTITUTIONAL LAW APPLICABLE BEYOND THIS CASE BECAUSE THE LEGAL STANDARDS AT ISSUE WERE UNIQUE TO ALABAMA AND HAVE BEEN SUPERSEDED BY LEGISLATIVE ENACTMENT.

Plenary review of this case is also inappropriate because the court would be reviewing a system for assessing punitive damages that no longer exists in Alabama or anywhere else.

[26] This is particularly important because, as respondents will show in Point IV *infra*, there is substantial reason to doubt this assumption.

[27] *See* Point V *infra*.

In 1987 Alabama enacted tort reform legislation placing new and extensive substantive and procedural constraints on punitive awards. In particular:

1. Plaintiffs must meet a burden of "clear and convincing" evidence;
2. Punitive damages may be awarded only where conscious or deliberate conduct is at issue;
3. No presumption of correctness is accorded by the trial court to the jury's decision respecting punitive damages, nor by the appellate court to any trial court rulings;
4. If the jury awards punitive damages, either party may move the trial court for a hearing or the admission of additional evidence on the propriety of the award. Any relevant evidence is admissible, including "the economic impact of the verdict on the defendant or the plaintiff, the amount of compensatory damages awarded, whether the defendant has been guilty of the same or similar acts in the past, the nature and extent of any effort by the defendant to remedy the wrong, and the opportunity or lack thereof the plaintiff gave the defendant to remedy the wrong complained of"; [28]
5. Punitive damages may not be awarded against a principal for conduct of the agent unless the principal has ratified, endorsed or benefitted from the agent's conduct; and
6. Punitive damages have, with very limited exceptions, been capped at $250,000.

Ala. Code §§ 6-11-20 through 6-11-30. Although these legislative provisions did not apply to the present case, they have been in force in Alabama for more than two

[28] Similar protections had been established by the Alabama Supreme Court as a matter of common law in *Hammond* and were followed in this case.

years and will govern all present and future actions raising punitive damages claims like those at issue here. A ruling on the Alabama safeguards in effect before this tort reform legislation would thus provide little guidance as to the constitutionality of Alabama's current procedure.

Nor would a ruling in this case provide guidance as to procedures currently in effect in *other* States. To respondents' knowledge, no State makes use of a configuration of common law substantive limitations and procedural checks on jury discretion similar to that in force in Alabama—and scrupulously followed—during the trial in this case. Alabama law bifurcated punitive damages decisions. In making initial assessments, juries were required to evaluate the gravity of the wrong at issue and the extent to which punitive damages were needed to deter similar wrongs. *See Green Oil Co. v. Hornsby*, 539 So. 2d 218 (Ala. 1989); *Hammond v. City of Gadsden*, 493 So. 2d 1374 (Ala. 1986). To prevent bias, all evidence of the plaintiff's and defendant's financial condition was inadmissible. *See Southern Life & Health Insurance Co. v. Whitman*, 358 So. 2d 1025 (Ala. 1978).

In cases in which juries awarded punitive damages, the trial court was required to conduct a post-verdict evidentiary hearing, applying substantive criteria identified by the Alabama Supreme Court. *See Hammond*, 493 So. 2d at 1378-1379. The trial court was also required to make written findings stating reasons for accepting or modifying the jury verdict, and these findings were subjected to *de novo* review by the Alabama Supreme Court. *See Central Alabama Electric Cooperative v. Tapley*, 546 So. 2d 371 (Ala. 1989).

Because no other State uses this constellation of safeguards against improper punitive damage awards, plenary review of this case would provide minimal guidance as to the constitutionality of *other* States' procedural and substantive safeguards.

Pacific Mutual's challenge to the Alabama law in force in 1987 thus presents no issues of national significance,[29] and no issues of continuing significance even within Alabama. At bottom, Pacific Mutual seeks review of fact-bound, historical questions relevant to no one but itself. These considerations make review particularly inappropriate. *See Rice v. Sioux City Memorial Park Cemetery*, 349 U.S. 70, 79 (1955) ("'[I]t is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties") (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)).

Furthermore, review at this point would constitute an inappropriate intervention into a well-functioning state judicial and legislative effort to keep abreast of evolving concepts of fairness and the dictates of the United States Constitution. In *Bankers Life & Casualty Co. v. Crenshaw*, this Court expressed a clear preference for state common law and legislative solutions rather than a constitutional ruling federalizing the law of punitive damages, which are an important and longstanding part of state tort law.[30] Alabama has adopted far-reaching common law and legislative solutions. These reforms should be given time to be tested so that Alabama and other States can assess their efficacy and determine whether other changes might be needed.

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[29] *See generally* Scalia, The Rule of Law as a Law of Rules, 56 U. Chi. L. Rev. 1175 (1989).

[30] The *Cranshaw* court observed:

> "Our review of appellant's claim now would short-circuit a number of less intrusive, and possibly more appropriate, resolutions: the . . . State Legislature might choose to enact legislation addressing punitive damage awards for bad-faith refusal to pay insurance claims; failing that, the . . . state courts may choose to resolve the issue by relying on the state constitution or on some other adequate and independent nonfederal ground."

108 S. Ct. at 1651 (footnote omitted).

This Court has repeatedly followed that course in declining to grant certiorari to review due process challenges to common law systems for determining punitive damages, where subsequent legislative reform had substantially altered the governing standards and procedures. *E.g., Sanders v. Clardy*, 551 So. 2d 1057 (Ala.), *cert. denied*, 110 S. Ct. 376 (Nov. 6, 1989); *Combined Insurance Co. v. Ainsworth*, 763 P.2d 673 (Nev.), *cert. denied*, 110 S. Ct. 376 (Nov. 6, 1989).[31]

III. THE LEGAL STANDARDS GOVERNING THE AWARD OF PUNITIVE DAMAGES IN THIS CASE DO NOT PRESENT ANY OF THE POTENTIAL CONSTITUTIONAL INFIRMITIES IDENTIFIED BY MEMBERS OF THIS COURT.

Plenary review in this case would be unwarranted even if the factual record and legal context presented no serious obstacles to review. This case does not raise the sole due process issue identified by this Court as worthy of consideration: whether punitive damages may constitutionally be imposed by juries "given unbridled discretion," *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 109 S. Ct. 2909, 2924 (1989) (O'Connor J., concurring in part), without statutory or common law standards constraining punitive awards. *See id.* at 2923 (Brennan, J., concurring). *See also Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986).

Under Alabama common law, the jurors in this case were not "left largely to themselves" in deciding whether to award punitive damages. *See id.* To the contrary, as demonstrated, the jury's discretion was substantially confined and was subjected to searching *de novo* scrutiny both in a post-verdict evidentiary hearing in the trial court and on appeal.[32]

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[31] Indeed, the Alabama procedures in effect when this case was tried were the State's initial judicial response to this Court's discussion of Alabama's prior common law rules governing punitive damages. *See Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828-829 (1986).

[32] *See* Point II *supra*.

Furthermore, clear and specific substantive criteria guided this scrutiny. In *Hammond*, the Alabama Supreme Court identified *inter alia* "the culpability of the defendant's conduct," the need to "discourag[e] others from similar conduct," the "impact on the parties," and the "impact upon innocent third parties" as factors that should be considered by the trial and appellate courts reviewing punitive awards. 493 So. 2d at 1379. The trial court applied *Hammond* in this case. App. A15.

Subsequent to *Hammond* and to the trial in this case, but prior to appellate review of the verdict at issue here, the Alabama Supreme Court specified seven factors against which punitive awards must be measured:

> "[1] Punitive damages should bear a reasonable relation to the harm that is likely to occur from the defendant's conduct as well as the harm that actually has occurred. If the actual or likely harm is slight, the damages should be relatively small. If grievous, the damages should be much greater.
>
> "[2] The degree of reprehensibility of the defendant's conduct should be considered. The duration of this conduct, the degree of the defendant's awareness of any hazard which his conduct has caused or is likely to cause, and any concealment or cover-up of that hazard, and the existence and frequency of similar past conduct should all be relevant in determining this degree of responsibility.
>
> "[3] If the wrongful conduct was profitable to the defendant, the punitive damages should remove the profit and should be in excess of this profit, so that the defendant recognizes a loss.
>
> "[4] The financial position of the defendant would be relevant.
>
> "[5] All the costs of litigation should be included, so as to encourage plaintiffs to bring wrongdoers to trial.
>
> "[6] If criminal sanctions have been imposed on the defendant for his conduct, this should be taken into

account in mitigation of the punitive damages award.

"[7] If there have been other civil actions against the same defendant, based on the same conduct, this should be taken into account in mitigation of the punitive damages award."

Green Oil Co. v. Hornsby, 539 So. 2d at 223-224 (quoting *Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d 1050, 1062 (Ala. 1987) (Houston, J., concurring specially)). The considerations set forth in *Hornsby* governed the Alabama Supreme Court's decision in this case.[33] And the Alabama Supreme Court routinely conducted a comparative proportionality review to ensure consistency across the range of cases. *See Aetna Life Insurance Co. v. Lavoie*, 505 So. 2d at 1053.

Alabama had identified specific substantive criteria that bear on the propriety of punitive damages, had forbidden jury consideration of potentially prejudicial evidence about the parties' financial status, and subjected punitive damages awards to searching post-trial and appellate scrutiny. These safeguards—which preserve a necessary and appropriate balance between flexibility and consistency in the law—more than satisfy Pacific Mutual's procedural due process right to a reasoned judicial decision predicated on trustworthy adjudicative procedures.

The mere absence of a legislatively prescribed range for punitive awards in no sense renders this common law regime so arbitrary or fundamentally unfair as to violate due process guarantees. As this Court has consistently recognized, state legislatures generally are "free to decide in sentencing how much discretion should be reposed in the judge or jury in noncapital cases." *Lockett v. Ohio*, 438 U.S. 586, 603 (1978) (plurality opinion). Even in capital cases, this Court has recognized that juries must be able to consider an encompassing range of factors in making "the difficult and uniquely human judgments that defy codification and that build discretion, equity, and flexibility into a legal system." *McCleskey v. Kemp*, 481 U.S. 279, 311 (1987) (quotation omitted).

[33] *Hornsby* was decided several months before the Alabama Supreme Court rendered its decision in the present case. That the court did not remand for application of these factors in a *Hammond* hearing as it did in *Hornsby* makes clear that the damages award at issue in this case raises no issue under the *Hornsby* factors.

The discretion exercised under Alabama law in deciding upon punitive damages was no greater than that involved in many substantive areas of the law—such as deciding "the best interests of the child," whether "reasonable care" has been exercised, or whether a fiduciary has exercised "due diligence." Nor was the discretion involved here any greater than that afforded juries deciding how much compensation is appropriate for pain and suffering or mental anguish. Many of the decisions our legal system requires cannot be reduced meaningfully to prescription. It does not follow, however, that decisions made in the absence of precise legislative formulations are necessarily arbitrary or unfair. So long as discretion is exercised within reasonable constraints, Due Process is satisfied. As demonstrated, ample constraints were in place in this case.

IV. RESPECT FOR ONGOING STATE REFORM EFFORTS AND RECENT EVIDENCE ABOUT THE ACTUAL IMPACT OF PUNITIVE DAMAGES CAST DOUBT ON THE WISDOM OF CONSTITUTIONALIZING PROCEDURAL REQUIREMENTS FOR PUNITIVE DAMAGES AWARDS.

Although this Court has indicated that plenary review may be warranted to determine the constitutionality of punitive damages awarded in the absence of legislative or common law standards, fundamental notions of judicial restraint and federalism counsel against review.

First, the factual assumption that runaway juries are awarding punitive damages bearing no reasonable or predictable relationship to harm inflicted by defendants is open to serious question. A special committee of the

American Bar Association concluded, after serious scrutiny of the issue, that "there is no clear evidence of a present or impending crisis in punitive damages. Much of the law is established and working well." *Punitive Damages: A Constructive Examination* (Report of the Special Committee on Punitive Damages, Section of Litigation, American Bar Association) at 1-2 (Nov. 1986). *See also* Johnston, *Punitive Liability: A New Paradigm of Efficiency in Tort Law*, 87 Colum. L. Rev. 1385, 1387 (1987).

Very recently, the United States Government Accounting Office published a study of punitive damages awards in five States, concluding *inter alia* that punitive damages correlated strongly with the size of compensatory awards and that appellate review provided a substantial, well-functioning safeguard against excessiveness. Indeed, post-verdict review by the trial court and appellate review eliminated or reduced a substantial majority of punitive damages awards in the States studied. *See* Product Liability: Verdicts and Case Resolution in Five States (GAO/HRD-88-99, Sept. 1989) at 29, 31, 32, 41, 69. This body of information suggests that punitive damages pose no significant social or legal problem.

At a minimum, there can be no doubt that punitive damages raise complicated, controversial jurisprudential and policy questions. No clear consensus exists on the nature or extent of the problem, or on what substantive standards and procedural mechanisms, if any, should be required. Any effort by this Court to dictate constitutionally required substantive standards and procedural safeguards will necessarily entail a high degree of judicial activism—and an on-going commitment to resolve the many due process issues that will inevitably arise in the trail of any foray into the law of punitive damages. Issues this complex and controversial are far better resolved through the legislative process, after appropriate legislative fact-finding. Defendants like Pacific Mutual have ample access to the legislative process so there is no need for this Court to intervene to correct for failure

of that process. Tort reform like that enacted in Alabama and elsewhere is substantial evidence that petitioner and other potential defendants are fully able to protect their interests in the legislative arena.

Second, review by this Court would pretermit an active re-examination underway in the States. Since the Court's first expression of concern about punitive damages in *Aetna Life Insurance Co. v. Lavoie*, 475 U.S. 813, 828 (1986), and its subsequent invitation to the States in *Bankers' Life* to "enact legislation addressing punitive damage awards," *Bankers Life*, 108 S.Ct. at 1651, the majority of states, including Alabama, have enacted substantial legislative reforms designed to limit and further channel awards of punitive damages [34]—and other States are considering such reforms. Contrary to Pacific Mutual's repeated assertion that immediate guidance from the Court is needed, this ongoing nationwide effort by

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[34] *See* Ala. Code § 6-11-20 *et seq.* (Supp. 1988); Alaska Stat. § 09.17.020 (Supp. 1988); Cal. Ann. Civ. Code §§ 3294, 3295 (West Supp. 1990); Colo. Rev. Stat. §§ 13-21-102, 13-25-127 (Supp. 1986); Conn. Gen. Stat. § 52-240(b) (Supp. 1989) (applicable to product liability cases); Fla. Stat. Ann. §§ 768.72 through 768.74 (West Supp. 1989); Ga. Code Ann. § 51-12-5.1 (Supp. 1989); Idaho Code § 6-1604 (Supp. 1989); Ill. Ann. Stat. ch. 110 §§ 2-604.1, 2-1207 (Smith-Hurd Supp. 1989); Ind. Code Ann. § 34-4-34-2 (Burns 1986); Iowa Code Ann. § 668A.1 (West 1987); Kan. Civ. Proc. Code Ann. §§ 60-3701 through 60-3703 (Vernon Supp. 1989); Ky. Rev. Stat. §§ 411.184, 411.186 (1988); Minn. Stat. Ann. §§ 549.191, 549.20 (West 1988); Mo. Ann. Stat. §§ 510.263 (Vernon Supp. 1990), 537.675 (Vernon Supp. 1988); Mont. Code Ann. § 27-1-221 (1987); Nev. Rev. Stat. Ann. § 42.005 (Supp. 1989); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); N.J. Stat. Ann. § 2A:58C-5 (West 1987) (applicable to product liability cases); N.D. Cent. Code § 32-03.2-11 (Supp. 1987); Ohio Rev. Code Ann. § 2315.21 (Page Supp. 1988); Okla. Stat. Ann. tit. 23, § 9 (West 1987); Or. Rev. Stat. §§ 30.925 (applicable to product liability cases) 18.540, 41.315 (1987); S.C. Code Ann. § 15-33-135 (Supp. 1988); S.D. Rev. Code § 21-1-4.1 (1987); Tex. Civ. Prac. & Rem. Code Ann. §§ 41.001 *et seq.* (Vernon Supp. 1990); Utah Code Ann. § 78-18-1 (Supp. 1989); Va. Code Ann. 8.01-38.1 (Supp. 1989).

state legislatures makes it unnecessary and inappropriate for the Court to interfere—particularly in a State, like Alabama, in the forefront of legislative reform.

State legislatures have enacted a broad range and variety of measures to guide the award of punitive damages. Of the forty-five States that permit an award of punitive damages,[35] twenty (including Alabama)[36] now legislatively mandate that punitive damages may be awarded only where it is proved by at least "clear and convincing" evidence that the defendant engaged in the requisite conduct, and three other States have adopted this burden of proof as a matter of common law.[37]

Nine States have enacted legislation capping punitive awards.[38] Several States have enacted statutory pro-

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[35] Louisiana, Massachusetts, Nebraska, New Hampshire, and Washington have abolished punitive damages except where explicitly authorized by statute. *See Vincent v. Morgan's Louisiana & T.R. & S.S. Co.*, 140 La. 1027, 74 So. 541 882 (1917); *Boott Mills v. Boston & M.R.R.*, 218 Mass. 582, 106 N.E. 680 (1914); *City of Loweli v. Massachusetts Bonding & Insurance Co.*, 313 Mass. 257, 47 N.E.2d 265 (1943); *Miller v. Kingsley*, 194 Neb. 123, 230 N.W.2d 472 (1975); N.H. Rev. Stat. Ann. § 507:16 (Supp. 1988); *Maki v. Aluminum Building Products*, 73 Wash.2d 23, 436 P.2d 186 (1968).

[36] *See* Ala. Code § 6-11-20; Alaska Code § 09.17.020; Cal. Code § 3294; Georgia Code § 51-12.5.1(b); Ind. Code § 34-4-34-2; Iowa Code § 668A.1(1)(a); Kansas Code § 60-3701(c); Kentucky Code § 411.184(2); Minnesota Code § 549.20. Subdivision 1; Montana Code § 27-1-221(5); Nevada Code § 42.005(1); North Dakota Code § 32-03.2-11; Ohio Code § 2315.21(c)(3); Oregon Code § 41.315; South Carolina Code § 15-33-135; South Dakota Code § 21-1-4.1; Utah Code 78-18-1(1).

[37] *See Linthicum v. Nationwide Life Insurance Co.*, 150 Ariz. 326, 723 P.2d 675 (1986) (*en banc*); *Tuttle v. Raymond*, 494 A.2d 1353 (Me. 1985); *Wangen v. Ford Motor Co.*, 97 Wis.2d 260, 294 N.W.2d 437 (1980).

[38] *See* Ala. Code § 6-11-21; Colo. Code § 13-21-102(1)(a); Fla. Code § 768.73(1)(a); Georgia Code § 51-12.5.1(g); Kansas Code § 60-3701(e); Nevada Code § 42.005.1; Oklahoma Code Title 23, § 9; Texas Code § 41.007; Virginia Code § 8.01-38.1. In addition, the Connecticut Supreme Court, in *Triangle Sheet Metal Works, Inc. v. Silver*, 154 Conn. 115, 222 A.2d 220 (1966), held that an award of punitive damages is limited to plaintiff's litigation expenses less taxable costs.

visions that: 1) specify standards guiding the determination or review of a punitive damage award;[39] 2) require or permit bifurcation of punitive damages trials;[40] 3) limit the admissability of evidence of defendant's wealth;[41] and 4) require court approval prior to the inclusion of a claim for punitive damages in a complaint.[42]

The abundance of legislative measures since 1986 demonstrates the wide variety of possible approaches to guiding jury discretion in awarding punitive damages. Because the States are addressing exactly the issues ientified in *Lavoie*, *Bankers Life*, and *Browning-Ferris*, review by this Court is unnecessary and inappropriate.

In *Banker's Life*, the Court declined to exercise jurisdiction over constitutional challenges to punitive damage awards, in part because it would be "unwise to foreclose" or "short-circuit" the possibilities of "less intrusive, and possibly more appropriate, resolutions" by state courts and legislatures. 108 S.Ct. at 1651. Exercise of the Court's jurisdiction in this case would "short-circuit" the reform efforts of state legislatures, which represent the collective judgment of constituents and which are particularly able, based on intimate knowledge of local conditions, to experiment with varying approaches to punitive damages that balance competing social and policy interests.

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[39] *See* Fla. Code §§ 768.73, 768.74; Kansas Code § 60-3701; Kentucky Code § 411.186; Minn. Code § 549.20 Subdivision 2; Mont. Code § 27-1-221; N.J. Code § 2A:58C-5; Oregon Code § 30.925.

[40] *See, e.g.*, Georgia Code § 51-12.5.1(d)(2).

[41] *See, e.g.*, Colorado Code § 13-21-102(6).

[42] *See, e.g.*, Idaho Code § 6-1604(2).

V. PACIFIC MUTUAL'S REMAINING CHALLENGES TO THE PUNITIVE DAMAGES AWARD IN THIS CASE RAISE NO IMPORTANT FEDERAL QUESTION.

Pacific Mutual has raised a host of additional constitutional challenges to the punitive damages award in this case. None involves an important or unsettled question of federal law. Nor does any involve a conflict with decisions of this Court, state supreme courts, or federal courts of appeals.

a. *Vicarious Liability.* As demonstrated, the facts do not present the question whether punitive damages may be vicariously imposed without any showing of fault on the part of the principal.[43] The evidence at trial clearly implicated Pacific Mutual in its employees' malfeasance. This issue has, in any event, been firmly settled in the jurisprudence of this Court for more than 60 years, and need not be reconsidered.

In *Louis Pizitz Dry Goods Co. v. Yeldell*, 274 U.S. 112 (1927), the Court rejected a challenge identical to the one at issue here. In that case, which involved a challenge to an Alabama statute authorizing punitive damages for wrongful death, a unanimous Court held that the imposition of punitive damages "without personal fault, having its foundation in a recognized public policy, is not repugnant to accepted notions of due process of law." 274 U.S. at 115. The Court went on to explain that such statutes served the salutary policy of prompting vigilance by "those who . . . are able . . . in the management of their affairs to guard substantially against the evil to be prevented." *Id.* at 116.[44]

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[43] *See* Point I *infra*.

[44] In this case, the jury doubtless concluded that Pacific Mutual had ample opportunity to prevent the fraud and failed to do so.

Furthermore, contrary to the suggestions in petitioner's reply to respondents' opposition to their application for a stay, there can be no question that the Court understood the Alabama statute at issue in *Pizitz Dry Goods* to authorize punitive awards, and not merely compensatory awards. That is why the Court explicitly held that the Constitution did not preclude State efforts to punish defendants who failed to prevent harm when they were in a position to do so.

The Court in *Pizitz Dry Goods* also explicitly distinguished the only case Pacific Mutual cites in support of its novel proposition, *Lake Shore & M.S.R. Co. v. Prentice*, 147 U.S. 101 (1893). In *Lake Shore*, the Court held merely that the majority position under the *common law* in 1893 was that punitive damages should not be imposed vicariously absent some showing of fault on the part of the principal. As *Pizitz Dry Goods* made clear, "no constitutional question was presented in Lake Shore." 274 U.S. at 115.[45]

Nothing in the text of the Fourteenth Amendment, or in the history of its passage, even remotely supports the substantive limit on state authority advocated by Pacific Mutual. There can be no plausible claim that such a limitation is "implicit in the concept of ordered liberty" such that "neither liberty nor justice would exist if it were sacrificed." *Palko v. Connecticut*, 302 U.S. 319, 325-326 (1937). Nor has Pacific Mutual demonstrated that this substantive limitation is so "deeply rooted in this Nation's history and tradition" as to be a fundamental right. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977) (plurality opinion). At bottom, Pacific Mutual urges this Court to indulge in "judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution." *Bowers v. Hardwick*, 478 U.S. 186, 194 (1986) Theirs is an economic substantive due process argument, pure and simple. Indeed, their position is so extreme that it was rejected in *Pizitz Dry Goods* even by a Court then disposed to favor substantive due process claims.

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[45] More recently, the Court cast considerable doubt on the correctness of *Lake Shore* even as a matter of common law. In *American Society of Mechanical Engineers v. Hydrolevel Corp.*, the Court noted that *Lake Shore* "may have departed from the trend of late 19th Century decisions." 456 U.S. 556, 576 n.14 (1982).

In any event, Alabama's tort reform legislation has now specifically addressed this precise question. Section 6-11-27 of the Alabama Code now provides that punitive damages may not be imposed on a principal for an agent's conduct unless the principal endorsed, ratified or benefitted from that conduct. Thus, even if Pacific Mutual's substantive due process claim had some merit, a ruling on this question would be of no current or continuing significance to anyone but Pacific Mutual.

b. *Criminal procedural protections.* Pacific Mutual urges this Court to decide whether the procedural protections afforded criminal defendants must, as a matter of Due Process, be extended to civil defendants facing possible punitive damages verdicts. This position has been uniformly rejected in the lower courts,[46] and need not be considered by this Court.

First, Pacific Mutual has not demonstrated—or even alleged—that it was deprived of any specific Fourth, Fifth or Sixth Amendment rights protecting criminal defendants. Pacific Mutual can make no plausible claim that it was forced to incriminate itself, that it was denied compulsory process, that it was denied effective assistance of counsel, that it was placed in double jeopardy, or that illegally obtained evidence was introduced against it. Thus, Pacific Mutual's claimed constitutional entitlement to these protections is not only vague and general, but also wholly hypothetical.

Second, the issue is unworthy of review in any event. As this Court's recent decision in *Browning-Ferris* makes clear, that a civil award may be imposed partially as punishment does not automatically entitle a civil defendant to the constitutional protections afforded crim-

[46] *See, e.g., Hansen v. Johns-Manville Products Corporation*, 734 F.2d 1036, 1042 (5th Cir. 1984), *cert. denied*, 470 U.S. 1051 (1985); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 234 Cal. Rptr. 835, 852 (Cal. App. 1987), *cert. denied*, 486 U.S. 1036 (1988); *Hawkins v. Allstate Ins. Co.*, 733 P.2d 1073 (Ariz.), *cert. denied*, 484 U.S. 874 (1987); *McDermott v. Kansas Public Service Co.*, 238 Kan. 462, 712 P.2d 1199, 1203 (1986).

inal defendants. 109 S. Ct. at 2913-2914. Rather, in holding the Eighth Amendment's Excessive Fines Clause inapplicable to punitive damages cases, the Court analyzed "the purposes and concerns of the Amendment, as illuminated by its history." *Id.* at 2914. Pacific Mutual has made no effort to show that the constitutional protections it seeks are appropriate in light of the purposes and histories of the Fourth, Fifth and Sixth Amendments. Nor could it. These provisions, like the Eighth Amendment, were intended to protect citizens against overzealous prosecution *by the government. See Browning-Ferris*, 109 S. Ct. at 2916.[47]

Third, there is no merit to Pacific Mutual's claim that Due Process requires plaintiffs seeking punitive damages to prove their case beyond a reasonable doubt. No court has held—or even suggested—that the Constitution permits punitive damages to be awarded only when a plaintiff demonstrates his or her entitlement beyond a reasonable doubt. Therefore, no guidance from this Court is required. Indeed, the ruling that Pacific Mutual seeks would throw into doubt vast areas of well-established law. It has never been thought, for example, that antitrust plaintiffs should be required by Due Process to demonstrate violations of the Sherman Act beyond a reasonable doubt before receiving treble damages—even though such damages are imposed in part to punish and deter. 15 U.S.C. § 15. Nor must civil RICO plaintiffs

[47] Pacific Mutual's reliance on *Kennedy v. Mendoza-Martinez*, 372 U.S. 144 (1963), is wholly misplaced. As the results in *Browning-Ferris* and numerous other decisions make clear, the punitive quality of a civil judgment does not automatically trigger the full panoply of criminal procedural protections. See also, *e.g., United States v. Ward*, 448 U.S. 242 (1980), in which the Court held that civil *monetary penalties* for violating water pollution laws did not trigger application of Fifth Amendment rights accorded criminal defendants. Moreover, Pacific Mutual's reliance on *Mendoza-Martinez* ignores a critical distinction. In that case, the *government* was acting against the defendants. The risk of overzealous use of government's authority was thus present. In civil litigation between private parties, of course, no such risk exists.

meet this exacting standard to obtain treble damages. 18 U.S.C. § 1964.

In any event, Pacific Mutual's claim has no merit. The Due Process Clause imposes on government the burden of proving criminal violations beyond a reasonable doubt because criminal punishment involves potential loss of liberty and serious stigma in most cases, and because government typically has at its command resources far beyond those of a criminal defendant. *See In re Winship*, 397 U.S. 358 (1970). These considerations are largely irrelevant to litigation between private parties. In other contexts, this Court has held that even the government need not prove its case beyond a reasonable doubt in proceedings involving civil penalties. *See United States v. Regan*, 232 U.S. 37 (1914) (civil penalty for inducing alien to enter country illegally).

c. *Equal Protection.* Pacific Mutual has also urged review of an alleged Equal Protection issue raised by the fact that the Alabama legislature has chosen to limit punitive damages in some, but not all, classes of cases. Because the petition for certiorari nowhere identifies the classes of cases in which punitive damages have been limited, there is no basis for evaluating whether the distinctions drawn by the legislature have a rational basis. This shortcoming alone should preclude review.[48]

The challenge is frivolous in any event. Any number of rational reasons might have motivated the legislature to limit punitive awards in some classes of cases but not others. The legislature might well have determined that the need for deterrence was not great in the areas where awards were limited, or might have sought to protect particularly vulnerable industries from severe punitive

[48] If the equal protection question is premised on the restrictions on punitive damages imposed in Alabama's tort reform legislation, the question is unworthy of review. *See* Point II *infra*. That legislation was not in force at the time this case went to trial. Thus, there does not appear to be any basis for the alleged equal protection violation asserted in the petition.

awards.[49] In areas not limited, the legislature might have believed substantial injustices to be possible, and that other penalties in the law did not provide sufficient deterrence. In any event, this issue is not presented with sufficient clarity to permit review.

CONCLUSION

For all the foregoing reasons, the petition for certiorari should be denied.

Respectfully submitted,

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[49] Pacific Mutual's argument that strict scrutiny should apply because punitive damages affect its fundamental rights to engage in commercial speech and gain access to the courts is spurious.